No. 98726-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DARCY L. JOHNSON, a single woman,

Petitioner,

vs.

STATE OF WASHINGTON, DEPARTMENT OF LIQUOR CONTROL BOARD,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus program and has an interest in the rights of persons seeking legal redress under the civil justice system.

II. INTRODUCTION AND STATEMENT OF THE CASE

Under the traditional rule governing liability of a business owner for injuries to a customer caused by a temporary dangerous condition, the customer had to prove that the business owner had actual or constructive notice of the condition. This case presents the Court with the opportunity to determine whether the traditional rule is consistent with this Court's adoption of the standard set forth in *Restatement (Second) of Torts* § 343 (1965), and the majority opinion in *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996), consisting of the 4-justice lead opinion and the single-justice concurrence. The facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Johnson v. State*, 10 Wn. App. 2d 1011, 2019 WL 4187744, *review granted*, 196 Wn.2d 1024 (Table); State Am. Op. Br. at 6-16; Johnson Resp. Br. at 3-18; Johnson Pet. for Rev. at 2-11; State Ans. to Pet. for Rev. at 2-7; Johnson Supp. Br. at 1-7; State Supp. Br. at 3-5.

In June, 2011, Darcy Johnson and Steve Pallas went to a State-owned liquor store at approximately 11:30-11:45 a.m. Johnson and Pallas testified that it had been raining continuously since 6:00-7:00 a.m. that

morning. As they entered, they crossed two rubber mats and two carpeted mats before stepping onto the linoleum-surfaced floor. Pallas entered first, and as soon as he stepped off the second carpeted mat his foot slipped. As he turned to warn Johnson, she had already stepped onto the floor, where she slipped and fell. Before she fell, neither Johnson nor Pallas noticed any water on the floor. Johnson testified that after she fell her pant leg was wet and she noticed water on the floor.

Jay Smiley was the only clerk working at the store on the day that Johnson fell. Smiley testified that he arrived at the store approximately one-half hour before he opened it, at either 9:00 or 10:00 a.m. Smiley testified in his deposition that it had started raining approximately 15 minutes before Johnson arrived; at trial, he agreed that it could have been raining when he arrived at work. Smiley stated that on rainy days, customers' feet get wet and they track water into the store, and that when it rained, that triggered his "need" to put out a bright yellow sign that warned the customers entering the store that the floor was "slippery when wet." Smiley had not put out the sign before Johnson's fall because the store was busy and he was the only clerk on duty. After Johnson fell Smiley did not see any water on the floor. Before Johnson, no one had ever fallen at the store.

At trial, at the close of plaintiff's case the defendant moved to dismiss under CR 50 on the basis that Johnson had not presented any evidence that the State had actual or constructive notice of water on the floor or any dangerous condition inside the store. The trial court found that

Johnson's testimony that her pantleg was wet and Smiley's testimony that the "slippery when wet" sign was supposed to be put out whenever it was raining provided sufficient evidence to survive the motion. The jury returned a verdict for Johnson and the trial court denied the State's motions for judgment notwithstanding the verdict or remittitur.

The State appealed, and the Court of Appeals held that Johnson failed to present evidence that the liquor store had actual or constructive notice of a dangerous condition, which precludes recovery. The court reversed and remanded with direction to vacate the verdict and dismiss the case. *See Johnson v. State*, 2019 WL 4187744, at * 3.

Johnson petitioned for review, including the following issues: 1) whether the Court of Appeals decision "conflict[s] with the holding in *Iwai v. State* ... regarding the sufficiency of evidence to support a constructive notice standard of premises liability to business invitees"; 2) whether the Court should "reinstate the jury's verdict and apply the reasonably foreseeable standard for premises liability to business invitees, as urged by the 4-Justice plurality of the Court in *Iwai*." Pet. for Rev. at 1 (brackets added). This Court ordered: "[T]he petition for review is granted only on the issue whether the foreseeability exception to the notice requirement applies in the context of premises liability actions." *Johnson v. State*, 196 Wn.2d 1024, 2020 WL 7056297, at * 1 (Table) (December 2, 2020) (brackets added).

III. ISSUE PRESENTED

Whether actual or constructive notice remains a requirement for establishing a premises liability claim against a business owner for injury to a customer caused by a temporary unsafe condition, in light of this Court's adoption of *Restatement (Second) of Torts* § 343 (1965) and its holding in *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996)?

IV. SUMMARY OF ARGUMENT

In Washington, a business owner owes its customers the duties that a possessor of premises owes to invitees. The traditional rule that required actual or constructive notice for a business owner to be liable to customers for an unsafe condition has been replaced by Washington's adoption of *Restatement (Second) of Torts* § 343 and its standard that requires a possessor of premises to exercise reasonable care to protect invitees from unsafe conditions of which the possessor knows or would discover through the exercise of reasonable care. This standard obliges the possessor to inspect for unsafe conditions followed by reasonably necessary repair, safeguards or warning. The holding of this Court in *Iwai* (which is the position taken on the narrowest grounds by the five Justices in the plurality and concurring opinions) is that the duty owed by a possessor of premises to an invitee is governed by § 343, and that where a plaintiff/invitee can show that the possessor of premises knows of or in the exercise of reasonable care would discover an unsafe condition, the plaintiff need not also prove actual or constructive notice of the specific condition.

A business owner's duty to protect customers from unsafe conditions is broader than a standard that only requires a business owner to correct or warn of temporary unsafe conditions if the business owner has actual or constructive notice of the danger. Accordingly, the Court should hold that a customer injured by a temporary unsafe condition on business premises is not required to prove that the business owner had actual or constructive notice of the temporary unsafe condition.

V. ARGUMENT

A. Overview Of The Liability Of An Owner Or Occupier Of Premises For Injuries To An Invitee Under Washington Law.

1. The traditional rules governing liability of a business owner for injury to a customer caused by a temporary unsafe condition required proof of actual or constructive notice.

In premises liability actions, a person's status upon the land determines the scope of the duty of care owed by the possessor of the property. *See Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). The owner or occupier of business premises owes a customer the duties that owners or occupiers of land owe to invitees. *See McKinnon v. Washington Fed. Savings & Loan Ass'n*, 68 Wn.2d 644, 648-49, 414 P.2d 773 (1966).

The Court stated the "traditional rule" in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983):

> It has long been settled in this state that for the possessor of land to be liable to invitees for the unsafe condition of his land, he must have actual or constructive notice of that unsafe condition.

> [W]here the negligence of a storekeeper... is predicated upon his failure to keep his premises in a reasonably safe condition, it must be shown that the condition has either been brought to his notice or has existed for such time as would have afforded him sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.

100 Wn.2d at 44 (quoting *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)); *see also Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 458, 805 P.2d 793 (1991) (quoting *Smith*, 13 Wn.2d at 580).

In *Wiltse*, the Court stated that the lack of evidence of actual notice or evidence establishing how long the specific dangerous condition existed in order to show that the business owner had constructive notice precludes recovery. *See Wiltse*, 116 Wn.2d at 458.The Court quoted approvingly from *Kangley v. United States*, 788 F.2d 533, 534-35 (9th Cir. 1986):

> [T]he mere presence of water on the floor where the plaintiff slipped is not enough to prove negligence on the part of the owner or occupier of the building.... To prove negligence, the plaintiff must prove that water makes the floor dangerously slippery and that the owner knew or should have known both that water would make the floor slippery and that there was water on the floor at the time the plaintiff slipped....
> The existence of a rug inside a door alone is not enough to establish that an owner knows the floor might be dangerous.... The same is true of the fact that it is wet outside.

Wiltse, 116 Wn.2d at 459-60.

These traditional rules were based upon the premise that a patron of a store "does not have an absolute, unqualified right under all circumstances to assume that 'the floors and aisleways are in a reasonably safe condition to walk upon,'" and a customer "had the right to assume that it was in a

reasonably safe condition for travel only until she knew, or, should have known, the contrary." *Smith*, 13 Wn.2d at 576-77 (citations omitted).

2. This Court adopted an exception to the traditional notice requirement for injuries to a customer from conditions on the business premises where the operation of the business is such that unsafe conditions are reasonably foreseeable.

In *Pimentel*, the Court eliminated the requirement for an injured customer to show active or constructive notice when "the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." *Pimentel*, 100 Wn.2d at 49. "Where the existence of unsafe conditions is reasonably foreseeable, it will now be unnecessary to establish the length of time for which the particular unsafe condition existed." *Id.* This Court quoted the Colorado Supreme Court to explain the reason for eliminating the notice requirement:

> The basic notice requirement springs from the thought that a dangerous condition, when it occurs, is somewhat out of the ordinary.... In such a situation the storekeeper is allowed reasonable time, under the circumstances, to discover and correct the condition, unless it is the direct result of his (or his employees') acts. However, when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves. Then, actual or constructive notice of the specific condition need not be proved.

Pimentel, 100 Wn.2d at 47-48 (quoting *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418, 420-21, 494 P.2d 839 (1972)).

3. This Court adopted *Restatement (Second) Of Torts* § 343 as the standard governing the duty owed by a possessor of land to invitees.

Washington looks to the *Restatement (Second) of Torts* for guidance on premises liability issues. *See, e.g., Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980). For a time, this Court cited § 343 without expressly adopting it. *See Egede-Nissen*, 93 Wn.2d at 132; *Wiltse*, 116 Wn.2d at 458. Prior to the adoption of § 343 the notice requirement for temporary dangerous conditions persisted. *See Geise v. Lee*, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975); *Wiltse*, 116 Wn.2d at 458.

It appears that this Court expressly adopted § 343 in *Tincani. See Iwai v. State*, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996) (citing *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996) (citing *Tincani*, 124 Wn.2d at 138-39)). Under § 343, a landowner's duty attaches if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk." The § 343 affirmative duty to discover unsafe conditions distinguishes the duty a landowner owes to an invitee from the duty owed to a licensee. *See Egede-Nissen*, 93 Wn.2d at 132.[1]

Under § 343, "reasonable care" imposes on the landowner the duty "to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Tincani*, 124 Wn.2d at 139 (quoting *Restatement*

[1] These differing standards are evidenced by the language of the *Restatement* delineating the duties owed to licensees and invitees. *Compare Restatement (Second) of Torts* § 342(a) (1965) (duty to a licensee exists if the possessor "knows or has reason to know the condition"), *with* § 343 (duty to an invitee exists if the possessor "knows or by the existence of reasonable care would discover the condition").

(Second) of Torts § 343 cmt. b). "The landowner's responsibility to an invitee is based on the invitee's expectation that the premises have been made safe for the invitee's visit." *Degel*, 129 Wn.2d at 53. Section 343 embodies Washington's common law. *See Degel*, 129 Wn.2d at 50; *Iwai*, 129 Wn.2d at 95.

4. In *Iwai v. State*, the lead and concurring opinions concluded that where the plaintiff/invitee shows that the owner or occupier of premises knows of or in the exercise of reasonable care would discover an unsafe condition, the plaintiff need not also prove actual or constructive notice of the specific condition.

In *Iwai v. State*, *supra*, Barbara Iwai was injured when she slipped and fell on an ice-covered area of an office parking lot that was particularly slippery due to the sloped design of the lot. Iwai filed suit against the State (the tenant of the building and parking lot), alleging that it had done nothing to protect or warn its invitees on the day of her fall. The defendants moved for summary judgment, arguing, among other defenses, that plaintiff had failed to allege the defendants had notice of a specific dangerous condition. The trial court granted the summary judgment motion. Iwai appealed, and the Court of Appeals reversed. This Court affirmed the Court of Appeals. The Supreme Court issued three opinions: a four-justice lead opinion, a one-justice concurrence and a four-justice concurring and dissenting opinion.[2]

[2] In this brief, we refer to Justice Dolliver's four-justice opinion as the "lead" or "plurality" opinion. When we refer to the majority opinion, we mean the issues that are agreed upon between Justice Dolliver's lead opinion and the concurring opinion written by Justice Alexander.

The plurality identified *Restatement (Second) of Torts* §§ 343 and 343A (1965) as the "appropriate tests for determining landowner liability to invitees." *Iwai*, 129 Wn.2d at 93.

> Under the standard set by *Restatement (Second) of Torts* § 343, a landowner's duty attaches only if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk...." The phrase "reasonable care" imposes on the landowner the duty "to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'"

Id. at 96 (quoting *Tincani*, 124 Wn.2d at 138-39 (quoting § 343 & cmt. b)).

The plurality stated the "traditional rule" is that an owner is liable for injuries caused by a transitory unsafe condition only if it had actual or constructive knowledge that the condition existed. *See id.* at 96-98. To prove constructive notice, a plaintiff must show that the unsafe condition had "existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Id.* at 96.

The plurality noted that a strict application of the notice requirement will allow the possessor of premises to plead ignorance of the specific condition causing an injury, despite its general knowledge of the unsafe condition. *See id.* at 101.[3] The plurality noted two exceptions to the notice

[3] Prosser commented on a business owner's affirmative duty to inspect: "[A person] may... be engaged in an activity, or stand in a relation to others, which imposes upon him an obligation to investigate and find out, so that the person becomes liable not so much for being ignorant as for remaining ignorant; and this obligation may require a person to know at least enough to conduct an intelligent inquiry as to what he does not know. The occupier of premises who invites business visitors to enter... [is] charged with the duty of the affirmative action which would be taken by a reasonable person in their position to discover

requirement in premises liability cases: 1) the *Pimentel* "self-service" exception, applicable where a specific unsafe condition is "foreseeably inherent" in the nature of the business or mode of operation; 2) where the landowner caused the hazardous condition. *See id.*, 129 Wn.2d at 98-102. The plurality dispensed with the "self-service" requirement altogether, and held that "[t]he reasonably foreseeable exception to the notice requirement should be applied to any situation ... where 'the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.'" *Id.* at 100 (quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994)).[4]

The plurality stated that the icy patch where the plaintiff fell was a temporary condition, and acknowledged that application of the traditional rules would support the trial court's summary judgment dismissal of the plaintiffs' case because Iwai did not show that the State had actual or constructive notice of the specific unreasonably dangerous condition on the day of Iwai's fall. *See Iwai*, 129 Wn.2d at 97-98. And yet the lead opinion denied summary judgment, holding that "[a] jury must decide whether such

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dangers of which they may not be informed." W. Page Keeton, et al., PROSSER AND KEETON ON TORTS, ch.5, § 32, p. 185 (5th ed., 1984) (brackets added).

[4] In support of this holding, the *Iwai* plurality noted that some other jurisdictions applied the reasonably foreseeable exception to the notice requirement in cases involving slips caused by tracked in rain or snow. *See Iwai*, 129 Wn.2d at 101 (citing *Buttrey Food Stores Div. v. Coulson*, 620 P.2d 549 (Wyo. 1980); *F. W. Woolworth Co. v. Stokes*, 191 So.2d 411 (Miss. 1966)). In *Buttrey*, the Supreme Court of Wyoming stated "where the existence of water on the floor of the store premises was a reasonable probability because of the weather conditions no proof of actual or constructive notice is required." 620 P.2d at 553. In *Stokes*, the Supreme Court of Mississippi stated "when plaintiff has shown that the circumstances were such as to create a reasonable probability that the dangerous condition would occur, he need not also prove actual or constructive notice of the specific condition." 191 So.2d at 416.

risk was foreseeable, and whether Defendants fulfilled their duties in light of the foreseeability of the risk." *Id.* at 102.

The single-justice concurrence agreed with the plurality on the basis that the result was required by §§ 343 and 343A, which "clearly specify the duties owed by an occupier of land to his or her invitees." *Id.* at 102-03 (Alexander, J., concurring). Justice Alexander disagreed with the plurality's expansion of the *Pimentel* "self-service" exception to the notice requirement "without tying it to the *Restatement* sections." *Id.* at 103. Justice Alexander expressed concern that the plurality's extension of the *Pimentel* "self-service" exception created unnecessary uncertainty in premises liability law by providing an unclear rule, whereas §§ 343 and 343A offered a simple standard that provided adequate protection to invitees and was "functionally equivalent" to the rule adopted by the "majority." *See id.* at 102-03. He agreed that a jury must consider the facts raised by Iwai and determine whether the State exercised reasonable care in keeping the parking lot free from dangerous snow and ice. *See id.* at 103.

The four-justice dissenting opinion dissented to what it termed the "majority opinion," which it interpreted to hold the landlord liable "without actual or constructive notice of a dangerous condition and a reasonable time for repair." *See id.* at 103-04 (Guy, J., concurring and dissenting). The dissent favored limiting *Pimentel* to self-service business operations. *See id.*

B. The Court Of Appeals Erred In Failing To Apply The Holding In *Iwai* (Consisting Of The Grounds Agreed To In The Lead And Concurring Opinions) To Hold That Where Johnson Proved That The State Knew, Or In The Exercise Of

Reasonable Care Would Have Discovered, The Unsafe Condition, Johnson Was Not Also Required To Prove That The State Had Actual Or Constructive Notice.

1. A majority of this Court in *Iwai*, consisting of the plurality and concurrence, concluded that actual or constructive notice is not required in premises liability actions.

In Washington, "[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *W.R. Grace & Co. v. State*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) (brackets added) (citation omitted); *see also In re Pers. Restraint of Francis*, 170 Wn.2d 517, 532 n.7, 242 P.3d 866 (2010). In *Iwai*, five Justices agreed that *Restatement* § 343 was the applicable test for determining landowner liability to invitees. *See Iwai*, 129 Wn.2d at 93-94 (plurality); *id.* at 102-03 (concurrence). Those same five Justices also agreed that Iwai's failure to establish actual or constructive notice of the specific dangerous condition that caused her fall did not preclude submission of her case to a jury. *See id.* at 101-02 (plurality); *id.* at 102-03 (concurrence). The narrowest grounds upon which the five Justices in the plurality and concurrence agreed are: 1) the duty owed by the owner or occupant of premises to an invitee is governed by *Restatement (Second)* § 343; 2) where a plaintiff/invitee can show under the § 343 standard that the owner or occupier of premises knows of or in the exercise

of reasonable care would discover an unsafe condition, the plaintiff need not also prove actual or constructive notice of the specific condition.[5]

The majority holding in *Iwai* was confirmed in *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 31 P.3d 684 (2001). In *Iwai*, the Court cited *Geise*, 84 Wn.2d at 871, as stating the traditional rule in premises liability cases where a plaintiff is injured from conditions caused by natural accumulations of snow or ice, which required the plaintiff to prove the premises owner or occupier had actual or constructive knowledge of the unsafe condition. *See Iwai*, 129 Wn.2d at 92. Applying §§ 343 & 343A, the majority did not require Iwai to prove actual or constructive notice. *See Iwai*, 129 Wn.2d at 93-102 (plurality), 102-03 (concurrence). In *Mucsi*, where the plaintiff sued the landowner for injuries from a fall on an icy sidewalk, this Court held that "in *Iwai*, this Court also determined, where the plaintiff is unable to establish actual or constructive notice, the plaintiff may present evidence to establish the unsafe condition was reasonably foreseeable." 144 Wn.2d at 859 (citing *Iwai*, 129 Wn.2d at 100-01). "There must be evidence of actual or constructive notice *or foreseeability*, and a

[5] Johnson offers a different interpretation of Justice Alexander's concurring opinion than that offered here. She reads the concurrence as concluding that notice is required, but that circumstantial evidence may be used to establish notice. *See* Johnson Supp. Br. at 15. Under that reading, Justice Alexander determined that circumstantial evidence of notice – that the County knew or should have known that the parking lot historically had become dangerous in the winter months when snow or ice accumulated – was admissible evidence and was sufficient to establish notice. Johnson's reading is a reasonable alternative reading and should lead to the same outcome in this case. However, this brief suggests that in light of Justice Alexander's urging that the Court adhere to the standard set out in § 343, which unlike § 342 makes no reference to a notice requirement, a more likely interpretation is that Justice Alexander would dispense with the notice requirement in favor of a standard modeled after the language of § 343.

reasonable time to alleviate the situation." *Mucsi*, 144 Wn.2d at 863 (citing *Iwai*, 129 Wn.2d at 94; emphasis added).

2. The trial court erred in failing to apply the majority holding in *Iwai*, which permits a premises liability claim by an invitee against a business owner who knows or in the exercise of reasonable care would discover the dangerous condition, without regard to the traditional rules requiring actual or constructive notice.

The appellate court below applied the traditional notice requirement to hold that the trial court erred in denying the State's CR 50 motion:

> To establish the State's liability for her injury, Johnson was required to show that (1) an unreasonably dangerous condition existed in the liquor store, and (2) the liquor store had actual or constructive notice of the dangerous condition.... Johnson did not present any evidence that the store had actual or constructive notice of the dangerous condition....When the plaintiff has not established actual notice, the plaintiff must show that the dangerous condition "'has existed for such time as would have afforded [defendants] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.'"... "[T]he lack of such evidence precludes recovery."

Johnson, 10 Wn. App. 2d 1011, at * 3 (citations omitted). The Court of Appeals refused to follow the lead opinion in *Iwai*, stating "the plurality opinion in *Iwai* has no binding effect." *Johnson* at * 4 (citing *Charlton v. Toys R Us – Delaware*, 158 Wn App. 906, 917-18, 246 P.3d 199 (2010)).

In requiring actual or constructive notice, the Court of Appeals misread the decision in *Iwai*. While the lead opinion in *Iwai* by itself is not binding precedent, the majority holding, consisting of the issues which were agreed upon between the lead and concurring opinions, is binding precedent. Properly construed, the majority in *Iwai*, composed of the lead and concurring opinions, confirmed that Washington case law has replaced

the "traditional rules" in slip and fall cases with the duties an occupier of premises owes to its invitees set forth in *Restatement (Second) of Torts* § 343, which do not require proof of actual or constructive notice.

C. Replacement Of The Traditional Notice Rule With The Reasonably Foreseeable Standard From *Restatement (Second) of Torts* § 343 Is Consistent With Existing Washington Law.

The traditional rules regarding the common law duties of business owners to protect customers from temporary hazards have been superseded by the Washington Supreme Court's adoption of § 343 in *Degel* and *Tincani* as defining the duty that an occupier of premises owes to its invitees. The Supreme Court has the power to consider whether a court-made doctrine based upon the common law continues to be viable. *See Freehe v. Freehe*, 81 Wn.2d 183, 189, 500 P.2d 771 (1972), *overruled on other grounds by Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). "[W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." *Id.* (quoting *Borst v. Borst*, 41 Wn.2d 642, 657, 251 P.2d 149 (1952)).

The requirement under the traditional rules that a plaintiff must show that a business owner had actual or constructive knowledge of a temporary hazardous condition was premised on the principle that a customer had no right to assume that the floors and aisles of a business are in a reasonably safe condition to walk upon. *See Smith*, 13 Wn.2d at 576-77. With the adoption of § 343, that principle is no longer sound:

> [An invitee] enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his

> reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care... in inspection to discover [the premises'] actual condition and any latent defects, followed by such repair, safeguards or warning as may be reasonably necessary for his protection under the circumstances.

Mucsi, 144 Wn.2d at 855 (brackets added) (quoting *Degel*, 129 Wn.2d at 53 (quoting *Restatement (Second) of Torts* § 343 cmt. b)).[6]

Under § 343, a possessor of premises has a duty to protect invitees from unreasonable risks of harm if the possessor "knows or by the exercise of reasonable care would discover" the risk. This duty comports with the rule stated in *Pimentel* that where unsafe conditions are continuous or reasonably foreseeable, there is no requirement to show actual or constructive notice of an unsafe condition in order to prove a store owner's liability for failure to maintain premises in a reasonably safe condition. *See Pimentel*, 100 Wn.2d at 49; *Wiltse*, 116 Wn.2d at 460-61. The rule adopted in *Pimentel* was taken from *Jasko*, where the Colorado Supreme Court reasoned that the traditional notice requirement developed because the occurrence of an unsafe condition is generally out of the ordinary, but where the unsafe condition is easily foreseeable "the logical basis for the notice

[6] *See also Restatement (Second) of Torts* § 343 cmt. d (1965): "An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor."

requirement dissolves," and "actual or constructive notice of the specific condition need not be proved." *Wiltse*, 116 Wn.2d at 453-54 (quoting *Jasko* 177 Colo. at 420-21).

In *Johnson*, the fact that the unsafe condition was "easily foreseeable" is established by the store clerk's statements that it was raining on the day Johnson fell, when it rained customers tracked water into the store, the store was busy with customers, and whenever it rained he needed to put up the sign warning customers that the floor was "slippery when wet." There is no logical basis to require proof that the clerk had actual or constructive notice of the wet floor where Johnson fell.

The traditional rule to prove liability of the possessor of premises for an injury to an invitee caused by a slip and fall on a natural accumulation of snow or ice required proof that the possessor had actual or constructive notice of the condition. *See Iwai*, 129 Wn.2d at 92 (citing *Geise*, 84 Wn.2d at 871). This Court confirmed the majority holding from *Iwai* that liability for an invitee's injury caused by a slip and fall on an icy parking lot may be based upon evidence of reasonable foreseeability in the absence of evidence of actual or constructive notice. *See Mucsi*, 144 Wn.2d at 859, 863.[7] There is no logical reason for a rule that an invitee injured on business premises as the result of a slip and fall on a floor slippery from water is required to prove notice by the possessor of premises in order to prove liability, when the rule for an invitee injured on business premises as the result of a slip and

[7] Again, this is consistent with § 343 & cmt. b, which requires the possessor of premises to exercise reasonable care to inspect the premises to discover unsafe conditions.

fall on snow or ice may prove liability of the possessor of premises by showing the condition was reasonably foreseeable without the requirement of proving the possessor had actual or constructive notice.

In addition, this Court has held that "a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 202, 943 P.2d 286 (1997) (concerning a business owner's duty to protect a customer from criminal acts of third persons). "As with physical hazards on the premises, the invitee entrusts himself or herself to the control of the business owner over the premises..." *Nivens*, 133 Wn.2d at 202. Recognizing a special relationship between a business and its customers "is consistent with general common law principles." *Id.* at 202 & n.2 (citing *Restatement (Second) of Torts* § 314A (3) (1965)).[8] The Court noted that because the customer entrusts himself or herself to the control of the business owner over the premises, the business owner has an affirmative duty to protect its customers from reasonably foreseeable hazards. *Id.* at 202-03, 205.

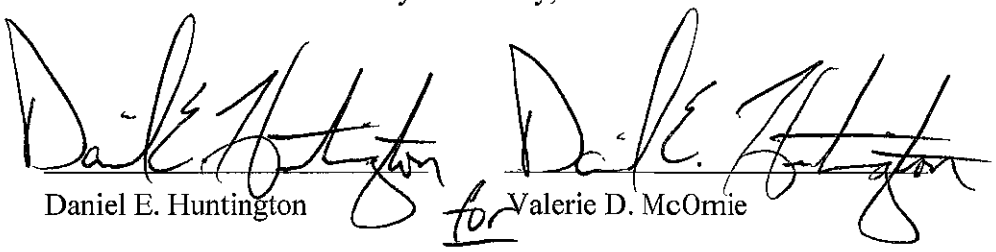
[8] *Restatement (Second) of Torts* § 314A lists examples of special relationships giving rise to a duty to protect, including "(3) [a] possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation." (Brackets added). Under § 314A(1)(a), a business owner is under a duty to take reasonable action to protect customers from unreasonable risks of physical harm. The "scope note" preceding § 314A provides that the duty of a possessor to maintain land and structures thereon is stated in §§ 328E-379, and "[t]he duty to continue services gratuitously rendered or to perform a gratuitous undertaking and the duty so to control the conduct of third persons as to prevent them from causing bodily harm to others are stated in this Topic." *Restatement (Second) of Torts*, Topic 7, DUTIES OF AFFIRMATIVE ACTION, Scope Note, p. 115 (1964) (brackets added).

Limiting liability to those instances where an injured customer can show that a business owner had notice of a temporary hazardous condition is too restrictive to comport with a business owner's § 343 affirmative duty to protect customers from dangers which can be discovered by the exercise of reasonable care. Liability should lie where a business owner knows or in the exercise of reasonable care should have discovered a dangerous condition. This standard requires that the possessor inspect for unsafe conditions followed by reasonably necessary repair, safeguards or warning. Actual or constructive notice of the specific condition should not be required.

VI. CONCLUSION

The Court should adopt the analysis in this brief in the course of resolving the issues on appeal.

DATED this 22nd day of January, 2021



Daniel E. Huntington for Valerie D. McOmie

On behalf of WSAJ Foundation

Appendix

Restatement (Second) of Torts § 314A (1965)

Restatement (Second) of Torts § 342 (1965)

Restatement (Second) of Torts § 343 (1965)

Restatement (Second) of Torts § 314A (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

§ 314A Special Relations Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

Comment:

a. An additional relation giving rise to a similar duty is that of an employer to his employee. (See § 314B.) As to the duty to protect the employee against the conduct of third persons, see Restatement of Agency, Second, Chapter 14.

b. This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated

in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

c. The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

d. The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from forces of nature or animals, or from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. (See § 302B.) It extends also to risks arising from pure accident, or from the negligence of the plaintiff himself, as where a passenger is about to fall off a train, or has fallen. The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.

e. The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one, as where a passenger appears to be merely carsick, and likely to recover shortly without aid.

f. The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

Illustrations:

1. A, a passenger on the train of B Railroad, negligently falls off of the train, and is injured. The train crew discover that he has fallen off, but do nothing to send aid to him, or to notify others to do so. A lies unconscious by the side of the track in a cold rain for several hours, as a result of which his original injuries are seriously aggravated. B Railroad is subject to liability to A for the aggravation of his injuries.

2. A, a passenger riding on the train of B Railroad, suffers an apoplectic stroke, and becomes unconscious. The train crew unreasonably assume that A is drunk, and do nothing to obtain medical assistance for him, or to turn him over at a station to those who will do so. A continues to ride on the train in an unconscious condition for five hours, during which time his illness is aggravated in a manner which proper medical attention would have avoided. B Railroad is subject to liability to A for the aggravation of his illness.

3. A is a guest in B's hotel. Without any fault on the part of B, a fire breaks out in the hotel. Although they could easily do so, B's employees fail to call A's room and warn him to leave it. As a result A is overcome by smoke and carbon monoxide before he can escape, and is seriously injured. B is subject to liability to A.

4. A, a child six years old, accompanies his mother, who is shopping in B's department store. Without any fault on the part of B, A runs and falls, and gets his fingers caught in the mechanism of the store escalator. B's employees see what has occurred, but unreasonably delay in shutting off the escalator. As a result, A's injuries are aggravated in a manner which would have been avoided if the escalator had been shut off with reasonable promptness. B is subject to liability to A for the aggravation of his injuries.

5. A, a patron attending a play in B's theatre, suffers a heart attack during the performance, and is disabled and unable to move. He asks that a doctor be called. B's employees do nothing to obtain medical assistance, or to remove A to a place where it can be obtained. As a result, A's illness is aggravated in a manner which reasonably prompt medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

6. A is imprisoned in a jail, of which B is the jailor. A suffers an attack of appendicitis, and cries for medical assistance. B does nothing to obtain it for three days, as a result of which A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

7. A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

Reporter's Notes

This Section has been added to the first Restatement.

Illustration 1 is based on Yazoo & M.V.R. Co. v. Byrd, 89 Miss. 308, 42 So. 286 (1906); Layne v. Chicago & Alton R. Co., 175 Mo.App. 34, 157 S.W. 850 (1913); Cincinnati, H. & D.R. Co. v. Kassen, 49 Ohio St. 230, 31 N.E. 282, 16 L.R.A. 674 (1892); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958); Continental Southern Lines, Inc. v. Robertson, 241 Miss. 796, 133 So.2d 543, 92 A.L.R.2d 653 (1961), passenger injured through his own negligence.

Illustration 2 is taken from Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192, Ann.Cas. 1916C, 856 (1915). Cf. Kambour v. Boston & Maine R. Co., 77 N.H. 33, 86 A. 624, 45 L.R.A. N.S. 1188 (1913); Jones v. New York Central R. Co., 4 App.Div.2d 967, 168 N.Y.S.2d 927 (1957), affirmed, 4 N.Y.2d 963, 177 N.Y.S.2d 492, 152 N.E.2d 519 (1958); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958).

Compare, as to the duty of a carrier to protect its passengers from dangers arising from the conduct of third persons: Hillman v. Georgia Ry. & Banking Co., 126 Ga. 814, 56 S.E. 68, 8 Ann.Cas. 222 (1906); Nute v. Boston & Maine R. Co., 214 Mass. 184,

Restatement (Second) of Torts § 342 (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and Use of Land

Topic 1. Liability of Possessors of Land to Persons on the Land

Title D. Special Liability of Possessors of Land to Licensees

§ 342 Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

See Reporter's Notes.

Comment:

a. The words "the risk" denote not only the existence of a risk, but also its extent. Thus "knowledge" of the risk involved in a particular condition implies not only that the condition is recognized as dangerous, but also that the chance of harm and the gravity of the threatened harm are appreciated.

b. If the licensees are adults, the fact that the condition is obvious is usually sufficient to apprise them, as fully as the possessor, of the full extent of the risk involved in it.

On the other hand, the possessor should realize that the fact that a dangerous condition is open to the perception of child licensees may not be enough to entitle him to assume that they will appreciate the full extent of the risk involved therein. As to this, see § 343B.

c. The possessor's duty also arises if he has had peculiar experience which enables him to realize the risk involved in a condition which he should recognize as unlikely to be appreciated by his licensee as an ordinary man or where he knows that his licensee's experience and intelligence is likely to prevent him from appreciating the risk which is appreciable by a man of ordinary experience and judgment.

d. Inspection. A possessor of land owes to a licensee no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible or even probable dangers.

A licensee's privilege to enter is a gift, and the licensee, as the recipient thereof, is entitled to expect nothing more than a disclosure of the conditions which he will meet if he acts upon the license and enters, in so far as those conditions are known to the giver of the privilege.

A member of the possessor's family or his social guest is also entitled at most to knowledge of such dangers as the possessor knows or has reason to know. If the possessor knows of the existence of a condition, but has no reason to know that it is dangerous, then he is under no duty to make the disclosure.

Illustrations:

1. A invites B to come to lunch. A knows that his private road has been so guttered by recent rains as to be dangerous to travel, but does not warn B of this condition, reasonably believing that B will see the bad condition of the road and will drive with sufficient care to avoid harm. B's attention, however, is diverted from the road by the screaming of his child, who has been stung by a bee. He fails to see the bad condition of the road. His car hits one of the gutters and skids off the road against a tree, causing him serious harm. A is not liable to B, irrespective of whether B is or is not guilty of contributory negligence in allowing his attention to be so diverted.

2. A invites his friend B to dinner. A knows that his private road has been dangerously undermined at a point where it runs along an embankment and that this is not observable to a person driving along the road. A, when giving the invitation, forgets to warn B of this. While B is driving along the road it collapses, causing serious harm to B. A is subject to liability to B.

3. Under facts similar to those in Illustration 2, except that A does not know that the road has been undermined but could have discovered it had he paid attention to the condition of his road, A is not liable to B.

4. A invites a friend, B, to take dinner with him at his country place at eight o'clock on a winter evening. A knows that a bridge in his driveway over which B must pass to reach A's house is in a dangerous condition which is not observable in the dark. A does not tell B of this fact. The bridge gives way under B's car, causing B serious harm. A is subject to liability to B.

e. Disclosure of natural as well as artificial dangers. As is stated in § 363, a possessor of land is ordinarily not subject to liability for bodily harm caused to persons outside of the land by a natural condition on the land, although he realizes that there is a grave chance that it will cause serious harm to them. The liability of a possessor of land who invites or permits licensees to enter his land is not based upon a duty to maintain it in safe condition. It is based upon his duty to disclose to them the risk which they will encounter if they accept his invitation or permission. He is required to exercise reasonable care either to make the land as safe as it appears, or to disclose the fact that it is as dangerous as he knows it to be. Therefore it is immaterial that a dangerous condition known to him, and which he has reason to believe that the licensees will not discover, is natural rather than artificial.

f. Preparations for licensee's safety. A licensee, in whose visit the possessor has no interest, is not entitled to expect that special preparations will be made for his safety or that the possessor will warn him of conditions which are perceptible by his senses, or the existence of which can be inferred from facts within the licensee's knowledge. The possessor is entitled to expect that the licensee, realizing all this, will be on the alert to discover conditions which involve risk to him. Indeed, it is not necessary that the condition be such as the licensee would discover by the use of his senses while upon the land. It is enough that from facts within his present or past knowledge he has reason to believe that a dangerous condition exists at that time. Thus a licensee whom a possessor permits to use a path across his land upon which excavation work is being carried on, is not entitled to expect that the possessor will warn him that the work has so far progressed as to make the path dangerous, if the licensee has knowledge that the excavation has been in progress. In such a case it is for the licensee by extra precaution to discover whether the work of excavation has gone so far as to make the path dangerous.

g. Change in condition. The rule stated in this Section applies to any change in the condition of the land after the licensee has entered it, or after he has been given permission to enter but before his entry, which the possessor should realize will involve an unreasonable risk of harm to the licensee.

Illustration:

5. A invites B, a social guest, to dinner. While they are at dinner a storm covers the front steps of A's house with sleet, making them unsafe to use in the dark. A discovers the condition, but does nothing to warn B. On leaving, B slips on the steps and is injured. A is subject to liability to B.

h. A possessor of land who permits licensees to enter is subject to liability for bodily harm caused to them by the dangerous state in which he permits a natural or artificial condition to remain, if, but only if, he not only knows of the condition but also should realize that it involves an unreasonable risk of causing physical harm to the particular licensee harmed thereby. In determining whether the possessor should realize that a known condition involves not only a risk but an unreasonable risk, the character of the invitation or permission is important. A condition, no matter how dangerous to those who come in contact with it, can involve risk to a particular licensee only if he may be expected to encounter it in the exercise of his license. Thus, if a possessor

gives to another a license to come upon the land by day, he may have no reason to expect the licensee to enter by night. Therefore he may be under no duty to warn the licensee of a condition which would be obvious in daylight. So too, a possessor has no reason to expect the licensee's presence at any point other than that within which the license gives him the privilege to enter. He is, therefore, under no duty to warn licensees of conditions which exist outside of the area covered by the license.

i. What constitutes reasonable care to warn. In determining whether the possessor who knows of a latent danger has failed to exercise reasonable care to warn his licensee, the burden of giving the warning, the gravity of the danger threatened by the condition, and the chance that the licensee will enter while the danger exists are all factors to be considered. This is peculiarly important where the danger comes into existence after the license is given. If the permission is for a single visit during a lengthy period, it would be clearly unreasonable to require the possessor to keep in constant touch with his licensee so that he might warn the licensee of dangers arising after the permission is given. On the other hand, if such a licensee notifies the possessor of his intention to act upon the permission, the possessor may be under a duty to warn the licensee of a new danger.

Illustration:

6. A invites his friend B to come and lunch at his house at any time when he is in the neighborhood. B writes to A, saying that he is on a motor trip and will spend the night at the X hotel in a town ten miles off, and will come over on the following day to lunch. Between the time when the invitation was first given and the time when A receives B's letter, the entrance to A's house has, to A's knowledge, become dangerous in a way not observable by persons using it. A does not call B on the telephone to warn him of the danger, as A might easily do at a very slight cost, and B, in ignorance of it, is hurt while attempting to use the dangerous entrance. A is subject to liability to B.

The possessor is required to go to greater pains to inform such a licensee of a new danger which threatens serious bodily harm or death if the permission is acted upon than if the danger threatened a merely trivial harm.

j. Effect of notices posted by possessor. A possessor of land fulfills his duty of warning by any notice which contains an adequate disclosure of the condition and which, if the risk is not disclosed by a mere notice of the condition, discloses also the risk involved. A notice to the effect that licensees enter at their own risk may be enough if the physical condition of the land indicates that there may be hidden dangers. Unless the physical conditions observable upon the land indicate to a man of ordinary judgment that there are hidden dangers, a notice to the effect that licensees enter at their own risk is not sufficient. Such a notice, while not satisfying the duty of the possessor, may be of importance in determining whether the licensee is guilty of contributory negligence, in not exercising the amount of care which such a notice would lead a reasonable man to believe to be necessary to ascertain the actual condition which he is likely to encounter.

k. Where warning inadequate. There will, however, be special situations in which the possessor has knowledge of facts from which he should realize that an ordinary warning will not be sufficient to notify the licensee of the danger, or to enable him to protect himself against it. Thus where the possessor knows that the licensee is blind, illiterate, or a foreigner, or a child too young to be able to read, it is not enough to rely upon a posted notice to give warning of the danger, and the possessor may still be required to exercise reasonable care to give adequate warning in some other way. In extreme cases, as in the case of the blind man, he may even be required to give physical assistance to enable the licensee to avoid the danger.

l. Dangers known to licensee. The licensee, who enters land with no more than bare permission, is entitled to nothing more than knowledge of the conditions and dangers which he will encounter if he comes. If he is warned of the actual conditions, and the dangers involved, or if he discovers them for himself without such warning, and fully understands and appreciates the risk, he is in a position to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining. Therefore, even though a dangerous condition is concealed and not obvious, and the possessor has given the licensee no warning, if the licensee is in fact fully aware of the condition and the risk, there is no liability to him.

Reporter's Notes

This Section has been changed from the first Restatement by condensing it slightly, and by the addition of Clause (c). Also by the addition of the words "or has reason to know." No other change in substance is intended.

Comment b: As to obvious conditions, see Dishington v. A.W. Kuettel & Sons, Inc., 255 Minn. 325, 96 N.W.2d 684 (1959); Rapoport v. Hume, 80 Ohio L.Abs. 119, 157 N.E.2d 889 (Ct.App.1957); Fentress v. Cooperative Refinery Ass'n, 149 Neb. 335, 31 N.W.2d 225 (1948); Cook v. 177 Granite St., Inc., 95 N.H. 397, 64 A.2d 327 (1949); Standard Oil Co. of Indiana v. Meissner, 102 Ind.App. 552, 200 N.E. 445 (1936); Griffin v. State, 250 App.Div. 244, 295 N.Y.Supp. 304 (1937). Compare, as to known conditions, Mississippi Power & Light Co. v. Griffin, 81 F.2d 292 (5 Cir.1936); Cutler v. Peck Lumber Mfg. Co., 350 Pa. 8, 37 A.2d 739 (1944); Kopp v. R.S. Noonan, Inc., 385 Pa. 460, 123 A.2d 429 (1956); Maxfield v. Maxfield, 102 N.H. 101, 151 A.2d 226 (1959).

Comment c: See Deacy v. McDonnell, 131 Conn. 101, 38 A.2d 181 (1944); Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106, Ann.Cas. 1915D, 319 (1914); John v. Reick-McJunkin Dairy Co., 281 Pa. 543, 127 A.2d 143 (1924).

Comment d: There is no duty to the licensee to inspect for unknown dangers: Brauner v. Leutz, 293 Ky. 406, 169 S.W.2d 4 (1943); Myszkiewicz v. Lord Baltimore Filling Stations, Inc., 168 Md. 642, 178 A. 856, 38 N.C.C.A. 91 (1935); Steinmeyer v. McPherson, 171 Kan. 275, 232 P.2d 236 (1951); Ford v. United States, 200 F.2d 272 (10 Cir.1952); Rosenberger v. Consolidated Coal Co., 318 Ill.App. 8, 47 N.E.2d 491 (1943); Gabbert v. Wood, 127 Cal.App.2d 188, 273 P.2d 319 (1954); Drutman v. Agar, 17 Misc.2d 291, 185 N.Y.S.2d 142 (Sup.Ct.1959). As to reasonable ignorance of the danger involved in a known condition, see Schlaks v. Schlaks, 17 App.Div.2d 153, 232 N.Y.S.2d 814 (1962).

Comment e: The duty to disclose extends to known natural conditions. Windsor Reservoir & Canal Co. v. Smith, 92 Colo. 464, 21 P.2d 1116 (1933); Kittle v. State, 245 App.Div. 401, 284 N.Y.Supp. 657 (1935), affirmed, 272 N.Y. 420, 3 N.E.2d 850.

Comment g: Change in conditions: Atlantic Greyhound Corp. v. Newton, 131 F.2d 845 (4 Cir.1942); Ellsworth v. Metheney, 104 F. 119, 51 L.R.A. 389 (6 Cir.1900); Nashville, C. & St. L.R. Co. v. Blackwell, 201 Ala. 657, 79 So. 129 (1918), obstruction in path; Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 194 P.2d 706 (1948); Olderman v. Bridgeport-City Trust Co., 125 Conn. 177, 4 A.2d 646 (1939); Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106, Ann.Cas. 1915D, 319 (1914); Jones v. Southern R. Co., 199 N.C. 1, 153 S.E. 637 (1930).

Comment h: Condition unknown to possessor: Gabbert v. Wood, 127 Cal.App.2d 188, 273 P.2d 319 (1954). The time when the licensee's visit is to be expected is an important factor as to what the possessor should anticipate and disclose: Sherman v. Maine Central R. Co., 110 Me. 228, 85 A. 755, 43 L.R.A. N.S. 1134 (1913); Reardon v. Thompson, 149 Mass. 267, 21 N.E. 369 (1899).

Comment i: See Uchman v Polish National Home, 330 Mass. 563, 116 N.E.2d 145 (1953); Adcock v. Sattler's Inc., 283 App.Div. 683, 127 N.Y.S.2d 412 (1954); Mistretta v. Alessi, 45 N.J.Super. 176, 131 A.2d 891 (1957).

Case Citations - by Jurisdiction

Restatement (Second) of Torts § 343 (1965)

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Restatement (Second) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and Use of Land

Topic 1. Liability of Possessors of Land to Persons on the Land

Title E. Special Liability of Possessors of Land to Invitees

§ 343 Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

See Reporter's Notes.

Comment:

a. This Section should be read together with § 343A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility. That Section limits the liability here stated. In the interest of brevity, the limitation is not repeated in this Section.

b. Distinction between duties to licensee and invitee. One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect only

that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

As stated in § 342, the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.

As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge.

c. As to invitees who go beyond the scope of the invitation, as to either time or place, see § 332, Comment *l.*

d. What invitee entitled to expect. An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

e. Preparation required for invitee. In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

f. Appliances used on land. A possessor who holds his land open to others must possess and exercise a knowledge of the dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boardinghouse is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder who is made ill by the fumes uses the bathroom with knowledge of all the circumstances, except the risk of so doing. This is true because the boardinghouse keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.

g. As to the duty of a possessor of business premises to protect his invitees from harm threatened thereon by third persons, see § 344.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2021, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

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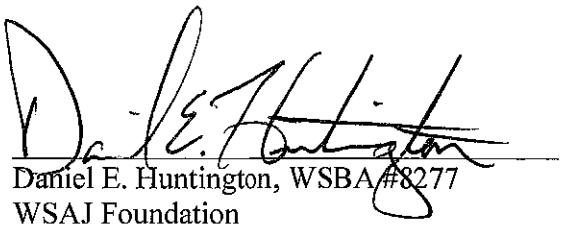

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